CASE NO. B247080

IN THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION EIGHT

WILFREDO VELASQUEZ,
Plaintiff and Appellant,
v.

CENTROME, INC. *DBA* ADVANCED BIOTECH
Defendant and Respondent.

ON APPEAL FROM THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,
HONORABLE ANTHONY J. MOHR
CASE NO. BC370319

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF NATIONAL IMMIGRATION LAW CENTER, CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, NATIONAL EMPLOYMENT LAW PROJECT AND FIVE ADDITIONAL PUBLIC INTEREST ORGANIZATIONS IN SUPPORT OF APPELLANT WILFREDO VELASQUEZ

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The undersigned counsel certifies, pursuant to Rule 8.208 of the California Rules of Court, that he represents the following entities, each of which is an organization joining in the attached application and *amici curiae* brief:

- Asian Americans Advancing Justice - Los Angeles
- California Rural Legal Assistance Foundation
- Centro Legal de la Raza
- Legal Aid Association of California
- Legal Aid Society – Employment Law Center
- National Employment Law Project
- National Immigration Law Center
- Service Employees International Union

Dated: June 30, 2014

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IDENTITY AND INTEREST OF AMICI

Proposed amici curiae Asian Americans Advancing Justice - Los Angeles, California Rural Legal Assistance Foundation, Centro Legal de la Raza, Legal Aid Association of California, Legal Aid Society – Employment Law Center, National Employment Law Project, National Immigration Law Center, and Service Employees International Union respectfully request leave under Rule 8.200(c) of the California Rules of Court to file the attached *amicus* brief in support of Appellant Wilfredo Velasquez.[1]

Asian Americans Advancing Justice - Los Angeles (Advancing Justice - LA), formerly the Asian Pacific American Legal Center, is the largest non-profit public interest law firm devoted to the Asian Pacific American community. Advancing Justice - LA provides direct legal services and uses impact litigation, public advocacy and community education to obtain, safeguard, and improve the civil rights of the Asian Pacific American community. Advancing Justice - LA serves 15,000 individuals and organizations each year through direct services, outreach, training, and technical assistance. Its primary areas of work include workers' rights, anti-discrimination, immigrant welfare, immigration and citizenship, voting rights, and hate crimes. As part of its civil rights work, Advancing Justice - LA has

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[1] Pursuant to Cal. Rules of Court 8.200(c) and 8.520(f), undersigned counsel certifies that no party or any counsel for a party in this matter authored any part of this proposed amicus brief or made a monetary contribution intended to fund the preparation or submission of this brief. In addition, counsel certifies that no person or entity aside from the United States made a monetary contribution intended to fund the preparation or submission of the brief.

served hundreds of workers and aided them in bringing claims for unpaid wages and employment discrimination.

The California Rural Legal Assistance Foundation (CRLAF) is a non-profit legal services provider which advocates for the rural poor in California and promotes the interests of low-wage workers, particularly farm workers. Since 1986, CRLAF has engaged in impact litigation, community education and outreach, and legislative and administrative advocacy in the areas of labor, housing, education, health, worker safety, pesticides, citizenship, immigration, and environmental justice. CRLAF is acutely aware of the occupational hazards undocumented workers experience in the workplace and the prejudice they face from juries. CRLAF is also aware that the risk of deportation for undocumented workers who reach the interior of the State is minimal, yet the fear and prejudice they experience has a tendency to depress wages and undermine labor standards enforcement for all workers. According to estimates by the Pew Research Center, 63% of unauthorized adult immigrants have resided in the U.S. for at least ten years and 22% for 5 to 9 years. Nearly half are parents of minor children, and 4.5 million citizen children have at least one unauthorized immigrant parent. CRLAF believes that a rule reducing damages for workplace injuries and fatalities based on the remote possibility that an undocumented plaintiff or decedent might have been deported would leave injured workers and their families without adequate compensation and provide negligent defendants with an undeserved windfall.

Centro Legal de la Raza (Centro Legal) was founded in 1969 to provide culturally and linguistically appropriate legal aid services to low-income, predominantly Spanish-speaking residents of Oakland's Fruitvale District and the greater Bay Area. The majority of its clients are immigrants, many of whom are undocumented. Through legal services clinics, Centro Legal assists approximately 9,000 clients annually with support ranging from advice and referrals, to full representation in court in the areas of housing law, employment law, family law, consumer protection, immigration law and support to survivors of domestic violence. Of the clients that Centro Legal serves, it provides legal assistance to about 600 clients with employment-related issues per year. As a result of its assistance in these employment matters, Centro Legal is all too aware of the risks of the prejudicial use of immigration status. Accordingly, the outcome of this matter is of considerable interest to the organization and to the clients it assists.

The Legal Aid Association of California (LAAC) is a non-profit organization created for the purpose of ensuring the effective delivery of legal services to low-income and underserved people and families throughout California. LAAC is the statewide membership organization for over 80 non-profit legal services organizations in the state. LAAC's members provide high-quality legal services to our state's most vulnerable populations. These services to low-income and other underrepresented individuals form an essential safety net in California and often ensure that the programs' clients have access to food, safe and affordable housing,

health care, employment, economic self-sufficiency, access to the legal system, and freedom from violence.

The Legal Aid Society – Employment Law Center ("LAS-ELC") is a San Francisco-based, non-profit public interest law firm that has for decades advocated on behalf of the workplace rights of members of historically underrepresented communities, including persons of color, women, recent immigrants, individuals with disabilities, and the working poor. Founded in 1916, LAS-ELC has litigated numerous cases in which the rights of undocumented workers to be protected against employment abuses have been at issue. Among LAS-ELC's published decisions in this regard are *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.* (N.D. Cal. 1998) 25 F.Supp.2d 1053, and *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.* (N.D. Cal. 2000) 103 F.Supp.2d 1180, in which, for the first time since the enactment of the Immigration Reform and Control Act of 1986 ("IRCA"), a federal court found it unlawful for employers to retaliatorily report to immigration authorities undocumented workers who had asserted their workplace rights; *Singh v. Jutla* (N.D. Cal. 2002) 214 F.Supp.2d 1056, which reaffirmed the vitality of the same rights and remedies after *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, which made back pay unavailable to undocumented workers under the National Labor Relations Act; and *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057, *cert. denied* (2005) 544 U.S. 905, in which the Ninth Circuit upheld a protective order barring a defendant from engaging in discovery to ascertain the immigration status of the plaintiffs in a Title VII employment

discrimination action; holding that their immigration status was irrelevant to their standing to bring suit and that such discovery would impermissibly chill the ability of workers to enforce their workplace rights.

The National Employment Law Project (NELP) is a national non-profit legal organization with over 40 years of experience advocating for the employment and labor rights of low-wage and immigrant workers. NELP has litigated and participated as amicus in numerous cases addressing the rights of immigrant workers and how their immigration status affects their right to bring claims, including *Salas v. Hi-Tech Erectors*, 168 Wash. 2d 664 (2010). NELP works to ensure that all workers receive the basic workplace protections guaranteed in our nation's labor laws. In NELP's experience, immigrant workers are often fearful to assert their rights because lawyers cannot guarantee that the client's immigration status will not be made part of the proceedings. This fear causes many workers to forgo legitimate claims, and undermines workplace protections for all workers.

The National Immigration Law Center (NILC) is a national legal advocacy organization whose mission is to defend and advance the rights of low-income immigrants and their families. NILC has a national reputation for its expertise in the complex intersection of employment and immigration law. NILC has litigated key immigration-related employment law cases, drafted legal reference materials relied on by the field, trained countless advocates, attorneys, and government officials, and provided technical assistance on a range of legal issues affecting low-wage immigrant workers, regardless of immigration status. NILC was co-

counsel in *Rivera, et al. v. NIBCO, Inc*. (9th Cir. 2004) 364 F.3d 1057 and *Singh v. Jutla & C.D. & R's Oil, Inc*. (N.D. Cal. 2002) 214 F.Supp.2d 1056.

The Service Employees International Union (SEIU) is an international labor organization representing approximately two million working men and women across the United States and Canada employed in the property services and healthcare industries as well as in the public sectors. Many of its members are foreign-born U.S. citizens and immigrant non-citizens. A core tenet of its mission is ensuring that all workers are treated with dignity and respect, which includes the right to a safe workplace and the right to be free from discrimination based on immigration status. Accordingly, SEIU bargains for workplace safety protections and provides informational and training resources to its members. SEIU is also committed to repairing our broken immigration system by working tirelessly to achieve commonsense immigration reform. In SEIU's experience, immigrant workers, in particular, are vulnerable to workplace safety violations due to their sometimes precarious legal status or their fear of unfair retaliation. Protecting the rights of workers regardless of immigration status therefore furthers SEIU's mission of ensuring that all workers receive fair and equal treatment and that employers satisfy their legally mandated health and safety obligations.

Proposed amicus LAS-ELC was counsel for the Plaintiff and Appellant in *Salas v. Sierra Chemical* (Cal. Sup. Ct, S196568, dated June 26, 2014), which in part addressed issues pertinent in this appeal (*infra*). All of the other proposed amici were amici in that case.

For the foregoing reasons, *amici* respectfully request that the Court accept the accompanying brief for filing in the case.

Dated: June 30, 2014

Respectfully submitted,

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INTRODUCTION

Amici, all of whom have long histories of working within immigrant communities in California, address two critical issues raised by this case: First, whether a noncitizen plaintiff's possible deportability is so speculative and remote that it is irrelevant in a tort action arising from workplace injuries. Second, whether a trial court can dispel the prejudice inherent in the admission of evidence of undocumented status by any means short of declaring a mistrial. In answer to the first question, amici contend that immigration status is never relevant in cases involving personal injuries. Amici contend further that the prejudice resulting from the admission of such evidence cannot be cured by further reference to it, and the trial court should have declared a mistrial.

These issues are of supreme importance to the communities amici serve. Studies show that immigrant workers suffer disproportionate exposure to workplace toxics and other occupational hazards. Immigrant workers are concentrated in more dangerous jobs and face greater risk of work-related injuries than the population at large. A ruling that limits immigrant workers' ability to pursue claims on an equal basis with citizens would seriously and adversely affect their access to justice and undermine safety standards for all workers.

Amici's legal arguments are based on the virtually plenary authority the federal government has over immigration issues and the consequent inability of state judicial officers, who are not well-versed in this complex area, to make reliable determinations of immigration status and deportability that do not conflict with the

federal scheme. Even if state trial courts could accurately determine immigration status and entitlement to immigration relief, the likelihood of deportation in any given case is impossible to predict, and so remote and speculative as to be irrelevant. The consequence of an erroneous ruling once a jury is informed that a noncitizen might be subject to removal is so prejudicial as to be irreparable.

ARGUMENT

I. IMMIGRANT WORKERS EXPERIENCE INCREASED EXPOSURE TO WORKPLACE HAZARDS

Immigrant workers perform some of the most hazardous jobs in the American workplace. Because the occupational risks to which they are exposed set the bottom line standards for all workers, their rights must be fully protected in the interests of all. From California's agricultural industry[2] to the Silicon Valley,[3] immigrant workers, both documented and undocumented, play a significant role in this State's economy.[4] California's undocumented population has been estimated

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[2] Martin and Taylor, *California Farm Workers*, (2000) 54 Cal. Agric. 19 (reporting that during a typical year, 35,000 farm employers in California hire 800,000 to 900,000 individuals, most of whom are Hispanic immigrants).

[3] See, e.g., O'Brien, *Silicon Valley Foreign Worker Search Speeds Up After Lull*, S.J. Merc. News (May 21, 2012).

[4] Immigrant households make up 27% of the total household income in California, and contribute about 33%, over $600 billion, to California's GDP. California Immigrant Policy Center, *Looking Forward: Immigrant Contributions to the Golden State* (2010), <https://caimmigrant.org/contributions.html> (as of June 27, 2014). Immigrants in California have a combined federal tax contribution of more than $30 billion annually, and undocumented immigrants in California alone paid $2.2 billion in state and local taxes in 2010. Immigration Policy Center, *New Americans in California* (2013) p. 3, <www.immigrationpolicy.org/sites/default/files/docs/new_americans_in_california_2013_1.pdf> (as of June 27, 2014).

at 2.6 million—approximately seven percent of the State's total population[5] and one-fourth of the population of undocumented immigrants nationwide.[6] Almost one in every ten workers in California is undocumented.[7]

Most immigrant workers are employed in low-wage occupations such as agriculture, construction, manufacturing, and service industries, where they face the greatest risk of work-related injury and death.[8] Approximately 29 percent of workers killed in industrial accidents in California in recent years were immigrants.[9] Their rate of nonfatal occupational injuries is also higher than average.[10] California routinely leads the nation in the number of immigrant workers killed on the job each year.[11] Researchers suspect that the real numbers may be greater than reported. While underreporting of workplace illnesses and injuries is a widespread issue for all workers, immigrant workers face additional

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[5] Pew Hispanic Center, *Unauthorized Immigrant Population: National and State Trends*, 2010 (Feb. 1, 2011) p. 24, <http://pewhispanic.org/files/reports/133.pdf> (as of June 27, 2014).
[6] *Id.* at 15.
[7] *Id.* at 24.
[8] Johnson and Hill, Public Policy Institute of California, *At Issue: Illegal Immigration* (2011) p. 9, <http://www.ppic.org/content/pubs/atissue/AI_711HJAI.pdf > (as of June 27, 2014).
[9] AFL-CIO, *Immigrant Workers at Risk: The Urgent Need for Improved Workplace Safety and Health Policies and Programs* (2005) p. 7.
[10] Immigrant workers suffer workplace injury at the rate of thirty-one injuries per 10,000, a rate higher than that for all workers. Pia Orrenius, et al., *Do Immigrants Work in Riskier Jobs?* (2009) 46 Demography 535.
[11] AFL-CIO, *Death on the Job: The Toll of Neglect* (2014), pp. 10, 135 <http://www.aflcio.org/content/download/126621/3464561/DOTJ2014.pdf> (as of June 27, 2014) (hereafter *Death on the Job)*.

threats of retaliation that cause them to conceal work-related injuries or illnesses.[12] A 2009 survey of low-wage workers, primarily immigrants, in three U.S. cities found that only eight percent of those injured on the job had filed claims for workers' compensation.[13] This reluctance to report injuries is justified since fifty percent of those who told their employers about their injuries were reported to immigration authorities, fired, or instructed not to file claims.[14]

In this case, Mr. Velasquez suffered a catastrophic work-related injury, losing eighty percent of lung capacity from toxic chemical exposure to diacetyl.[15] He did not seek compensation for his future lost earnings out of concern that the jury would learn his immigration status, and that he therefore would be prejudiced.[16]

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[12] AFL-CIO, *Death on the Job, supra* pp. 12-14; Marianne Brown et al., *Voices from the Margins: Immigrant Workers' Perceptions of Health and Safety in the Workplace* (2002). S*ee also* Rebecca Smith, *Immigrant Workers and Workers' Compensation: The Need for Reform* (2012) 55 Am. J. Indus. Med. 537.

[13] Annette Bernhardt et al., Center for Urban Economic Development at UIC, National Employment Law Project, and UCLA Institute for Research on Labor and Employment, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (2009) p. 25, <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1> (as of June 27, 2014).

[14] *Id*.

[15] The California Occupational Safety and Health Standards Board has determined that "diacetyl is a sufficient [though not necessarily the only] cause of fixed airways obstruction, as the criteria for causal association have been met: a) consistency of findings in many plants, three industries and by many investigators; b) degree of association; c) exposure-response relations; d) temporality, in that exposure preceded the health response and cessation of exposure resulted in stabilization in FEV1; e) biologic plausibility." (Cal. Occ. Saf. & Health Stds. Bd., *Occupational Exposure to Food Flavorings Containing Diacetyl*, Final Statement Of Reasons (Nov. 19, 2009), p. 4. <http://www.dir.ca.gov/oshsb/Diacetyl.html> [as of June 15, 2014]).

[16] Velasquez initially claimed loss of earnings as a category of damages, but he later dismissed that claim. [1 AA 96].

Even though he forfeited these substantial damages, the trial court announced his immigration status to the jury in the erroneous belief that his status was relevant to his eligibility for a lung transplant. Later, realizing its error, the trial court only offered to compound the damage by giving a 'curative' instruction, which would simply have prejudiced the jury further and was declined by Mr. Velasquez's counsel. The court should have declared a mistrial.

II. IMMIGRATION ENFORCEMENT IS A COMPLEX AND TECHNICAL FEDERAL CONCERN; STATE COURTS SHOULD AVOID TRYING TO DETERMINE WHICH NONCITIZENS MAY BE SUBJECT TO DEPORTATION

A. Federal Law, Not State Law, Controls Who Can Be Admitted to the United States and Who is Authorized to Work Here

Federal law establishes an exclusively federal system for determining immigration eligibility, work authorization, and deportability. (*In Re Garcia* (2014) 58 Cal.4th 440, 453 [165 Cal.Rptr.3d 855, 865]. *See* also *Arizona v. United States* (2012) 567 U.S. __ [132 S. Ct. 2492, 2498] (declaring that "[t]he federal power to determine immigration policy is well settled"); *Plyler v. Doe* (1982) 457 U.S. 202, 225 [102 S. Ct. 2382, 2399] (finding that, in the immigration context, states "enjoy no power with respect to the classification of aliens," since such power is committed exclusively "to the political branches of the Federal Government"); *DeCanas v. Baca* (1976) 424 U.S. 351, 354 [96 S. Ct. 933, 936] (noting that the "[p]ower to regulate immigration is unquestionably exclusively a federal power").)

The laws governing the acquisition and retention of immigration status are extremely complex. *See* generally Gordon et al., *Immigration Law and Procedure* (rev. ed. 2010) §§ 13.3-13.9A, 13-39 (observing that "frustrating difficulties [are] often presented by such assessments").[17] Indeed, immigration laws have been characterized as "'second only to the Internal Revenue Code in complexity.'" (*Castro-O'Ryan v. INS* (9th Cir. 1987) 821 F.2d 1415, 1419 (quoting E. Hull, *Without Justice for All 107* (1985)).) This exclusively federal system makes no provision for a state court to render independent determinations regarding immigration status. On the contrary, "[a] decision on removability requires a determination whether it is appropriate to allow a foreign national to continue

[17] For example, the INA currently establishes a wide array of different statuses for non-citizens. This non-exclusive list of provisions include: 8 U.S.C. §§ 1101(a)(l5) (listing 22 separate categories of temporary or "nonimmigrant" visas, many with several different subcategories of visas); 1101(a)(l5) (listing 13 separate categories of "special immigrant" visas, including many with subcategories); 1151 (establishing levels of permanent resident or "immigrant" visas based on different categories of family petitions and employment petitions); 1157 (refugees from outside the country); 1158 (asylees and applicants for political asylum from within the country); 1159 (adjustment to lawful permanent resident status for refugees or asylees); 1160 (adjustment to lawful permanent residents status for Special Agricultural Workers); 1182(d)(3) & (5) (parole of otherwise inadmissible persons into the United States); l184a (special provision for Philippine Traders); 1187 (Visa Waiver Program for temporary admission of nonimmigrants from certain countries); 1229b(b) (cancellation of removal and adjustment of status for certain nonpermanent residents-including undocumented persons and victims of domestic violence); 1231(b)(3) (restriction or withholding of removal); 1254a (temporary protected status for individuals from certain countries); 1255a (adjustment to lawful permanent resident status for certain entrants (1986 amnesty); 1259 (registration-for entrants prior to January 1, 1972); 1289 (codifying Jay Treaty Rights of Canadian Native Americans) 1255 (general adjustment to lawful permanent resident status provisions); 1257(adjustment for prior diplomats and consulate workers under Section 13 of the 1957 Act).

living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice." (*Arizona v. United States, supra*, 132 S.Ct. 2492, 2507.)

The complexity of the federal immigration scheme, the multitude of immigrant classifications within that scheme, and the intricate interplay between those classifications and federal work authorization all render state judicial officers ill-equipped to make determinations regarding deportability, immigration status and work authorization. Underlying this complex procedural apparatus is an array of federal regulations that set forth allowances and exclusions that authorize employment eligibility for dozens of categories of aliens. The immigration status of an individual is not dispositive of his work authorization. (*See* 8 C.F.R. §§ 274a.12-274a.14.) Work authorization status is subject to changes in circumstances and, in some cases, may not be easily documented.[18]

Moreover, within this complex system, immigration policy and work authorization rules are not static; they can change based on determinations made entirely in the federal realm. The fluid nature of immigration law and enforcement policy exacerbates the complexities faced by state judicial officers in making determinations about immigration and work authorization. No one can say whether Congress will reform the immigration laws, how enforcement priorities

[18] Federal regulations authorize certain immigrants to work despite the official expiration of their work authorization document. *See*, *e.g.*, 8 C.F.R. § 274a.12(a)(1), (a)(5), (b)(9), (b)(13), (b)(14), (b)(20).

will change, or how any such change will impact any particular individual who presently is undocumented. Any present-day predictions about future changes in immigration law and enforcement policy are sheer conjecture, and are not admissible evidence.

B. Federal Officials Are Solely Responsible For Exercising Their Discretion As To Which People Will Be Subject To Removal Proceedings, and the Likelihood of Those Residing in the United States Being Deported is Extremely Remote

If the probability of our nation's immigration laws remaining the same for the length of an injured plaintiff's lifetime is remote, the likelihood of an individual's deportation is arguably more unlikely. Just last year, the California Supreme Court acknowledged that, even when a noncitizen is apprehended, deportation is an unlikely outcome, given the federal government's "broad discretion in determining under what circumstances to seek to impose civil sanctions upon an undocumented immigrant and in determining what sanctions to pursue":

> Under current federal immigration policy it is extremely unlikely that immigration officials would pursue sanctions against an undocumented immigrant who has been living in this country for a substantial period of time, who has been educated here, and whose only unlawful conduct is unlawful presence in this country.

(*In Re Garcia, supra*, 58 Cal.4th 461.)

It is true that deportations in the border regions have increased under the Obama Administration; however, once an immigrant arrives in the interior of the country, the odds that he or she will be deported are minimal. Studies show that under current federal deportation practice, immigrants in the interior of the United

States face only a one to two percent yearly chance of deportation. Peter A. Schulkin, *The Revolving Door Deportations of Criminal Illegal Immigrants,* Center for Immigration Studies (2012). According to John Sandweg, the former Acting Director of Immigration and Customs Enforcement, "If you are a run-of-the-mill immigrant here illegally, your odds of getting deported are close to zero — it's just highly unlikely to happen." (Brian Bennett, *High Deportation Figures are Misleading*, Los Angeles Times, (April 1, 2014), <http://www.latimes.com/nation/la-na-obama-deportations-20140402-story.html#page=1> [as of June 27, 2014]).

Even when the United States seeks to remove an undocumented person, the person generally has a right to remain in the U.S. until a decision is made by a federal immigration judge, subject to appeal to the Board of Immigration Appeals and, in some circumstances, to the federal courts of appeal. (8 U.S.C. § 1229a(a)(1), 8 U.S.C. § 1229a(a)(3) and 8 U.S.C. § 1252). This process can take several years. In *People v. Cervantes* (2009) 175 Cal.App.4th 291 [95 Cal.Rptr.3d 858], the court recognized this likelihood of delay, holding that undocumented status does not preclude the granting of probation or require its revocation. The court explained that, "[i]mmigration review process may involve several stages, from the administrative law judge (ALJ) decision, to the BIA, and ultimately to the Ninth Circuit Court of Appeals. This process may not equal the bureaucratic nightmare faced by Josef K. in Franz Kafka's "The Trial," but unfortunately it is often unpredictable and slow." The court noted further that "even after an ALJ

and the BIA rule that an alien is deportable, he or she may remain in the United States for years after a federal court grants a stay pending review." (*Ibid*., citations omitted). Given the unlikelihood that any particular law-abiding noncitizen residing in the United States will be deported, no jury should be allowed to speculate on that remote possibility.

C. The Plenary Federal Authority Over Immigration Makes State Judicial Officers Ill-suited To Determine Immigration Status or Deportability of a Litigant

A rule that immigration status and the likelihood of deportation is relevant to future medical care in a personal injury suit would require state court judges (and, potentially, juries) to make complicated determinations in an area of law reserved to the federal government. Endorsing the initial approach taken by the trial court would thrust the court and the jury into a difficult role that federal law reserves for trained federal officers and would require state judges to engage in complex determinations regarding both the legal basis for deportability and the likelihood of a particular litigant being deported. This error has been criticized numerous times in California decisions and implicitly by the Legislature.

In *Farmers Brothers Coffee v. Workers' Comp. Appeals Bd.* (2005) 133 Cal.App.4th 533 [35 Cal.Rptr.3d 23] (*Farmer Brothers*), the Court of Appeal warned against precisely such an outcome in rejecting an employer's claim that its employee's unauthorized status rendered him ineligible for workers' compensation benefits. The court reasoned that

> If [workers'] compensation benefits were to depend upon an alien employee's federal work authorization, the Workers' Compensation Appeals Board would be thrust into the role of determining employers' compliance with the IRCA and whether such compliance was in good faith, as well as determining the immigration status of each injured employee, and whether any alien employees used false documents.

(*Id*. at p. 540-41.) As the court further reasoned, it was for this reason that the California Legislature acted to ensure that workers were fully protected in the workplace regardless of immigration status. (*Id.* at p. 451.)

The California Legislature has ensured that noncitizens, regardless of their immigration status, are entitled to the maximum state legal protections without running afoul of federal preemption. (*See*, *Martinez v. Board of Regents* (2010) 50 Cal.4th 1277 [117 Cal.Rptr.3d 359, 241 P.3d 855].) It has enacted a comprehensive set of statutes, known as Senate Bill (SB) 1818, which affirm that "all protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of their immigration status" and that "[f]or purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability." (Bus. & Prof. Code, § 6064, subd. (b), Civ. Code, § 3339; Gov. Code, § 7285; Health & Saf. Code, § 24000, Lab. Code, § 1171.5.)

Just last week, the California Supreme Court upheld SB 1818 against a preemption challenge, holding that

> [N]ot allowing unauthorized workers to obtain state remedies for unlawful discharge, including prediscovery period lost wages, would effectively immunize employers that, in violation of fundamental state policy, discriminate against their workers on grounds such as disability or race,

> retaliate against workers who seek compensation for disabling workplace injuries, or fail to pay the wages that state law requires. The resulting lower employment costs would encourage employers to hire workers known or suspected to be unauthorized aliens, contrary to the federal law's purpose of eliminating employers' economic incentives to hire such workers by subjecting employers to civil as well as criminal penalties.

(*Salas v. Sierra Chemical Co*. (June 26, 20-14, S196568) ___ Cal.4th ___ [pp. 18-19.]

The statutory framework of SB 1818 rests on compelling policy considerations that immigrants who are in the United States should be fully protected in the workplace and their right to full redress should not be diminished unless and until the federal government has taken action to remove them. Here, the trial court's decision to tell the jury that Mr. Velasquez was undocumented flew in the face of this right. The trial court's attempt to rectify its mistake was ineffective and failed to ensure the rights created by the California Legislature.

III. THE TRIAL COURT'S ASSUMPTION THAT MR. VELASQUEZ MIGHT BE DEPORTED PRIOR TO RECOVERY FROM HIS SURGERY WAS SO SPECULATIVE AS TO MAKE THE EVIDENCE IRRELEVANT

The trial court initially decided to inform the jury of Mr. Velasquez's immigration status because of an erroneous interpretation of expert testimony as to whether a patient's potential deportability was a factor in determining whether a lung transplant would be approved. This was simply wrong as a factual matter, as the Court later determined. Given the extreme unlikelihood that Mr. Velasquez would ever be deported, allowing the jury to speculate on his future presence in the United States was also wrong as a matter of law.

As explained above, the potential for any noncitizen to be deported is subject to complex and ever-changing federal law and policies. The California Supreme Court has twice turned aside arguments that undocumented immigrants are not entitled to relief based on speculation concerning their deportability. In *Clemente v. State of California* (1985) 40 Cal.3d 202, 222 [219 Cal.Rptr. 445, 457], the Court could not have been clearer that deportability is too remote and speculative to be relevant to such future damages as medical treatment or even lost wages, holding that, in the absence of evidence that the plaintiff intended to leave the country, "the speculation that he might at some point be deported was so remote as to make the issue of citizenship irrelevant to the damages question." (*See* also *Hernandez v. Paicius* (2003) 109 Cal. App. 4th 452, 460 [134 Cal.Rptr.2d 756] (explaining that there is "no room for doubt about . . . the irrelevance of immigration status in enforcement of state labor, employment, civil rights, and employee housing laws").)

More recently, the Court rejected the remote possibility of deportation of law-abiding aliens as a basis for denying them admission to the State Bar:

> Amicus curiae ... contend[] that because federal law permits immigration officials to remove an undocumented immigrant from this country on the basis of his or her unauthorized presence, the possibility that an undocumented immigrant may be removed from the country and leave his or her clients without representation is another reason that justifies the exclusion of all undocumented immigrants from the State Bar. A similar argument was advanced in *Raffaelli v. Committee of Bar Examiners* (1972) 7 Cal.3d 288, as one justification for excluding non-United States citizens from admission to the State Bar, but this court rejected the contention, pointing out that the risk of such removal was no greater than "the possibility that a lawyer, even though a citizen, may be involuntarily removed from his practice by death, by serious

> illness or accident, by disciplinary suspension or disbarment or by conscription. In any of the latter circumstances the client will undergo the same inconvenience of having to obtain substitute counsel."

(*In Re Garcia, supra*, 58 Cal.4th 440, 461, fn. 17 (citations partially omitted).)

In informing the jury of Mr. Velasquez's immigration status, the trial court here erroneously relied on *Rodriguez v. Kline* (1986) 186 Cal.App.3d 1145, 1149, which held that "whenever a plaintiff whose citizenship is challenged seeks to recover for loss of future earnings, his status in this country shall be decided by the trial court as a preliminary question of law." However, in *Rodriguez*, plaintiffs' immigration status was arguably relevant to the measure of his future lost earnings. Where, as here, lost future earnings have been waived and are not an issue, *Rodriguez* is not applicable.

IV. EVIDENCE OF UNDOCUMENTED ALIEN STATUS IS SO PREJUDICIAL THAT IT CANNOT BE CURED WITH AN ADMONITION TO A JURY

Eventually, the trial court recognized Mr. Velasquez's immigration status was irrelevant, albeit based on an incorrect analysis; and it proposed to cure the error by an instruction to the jury to disregard his immigration status. Since immigration status is such a provocative issue, no curative instruction could "unring the bell" with the jury; and a declaration of mistrial was the only proper course to take.

United States immigration policy has become increasingly polarized and contentious in recent years. The California Supreme Court has recognized it is a

"controversial subject," with partisans on both sides. *See Martinez, supra*, 50 Cal.4th at p. 1283 [117 Cal.Rptr.3d at p. 364].

For this reason, fear of exposing their immigration status in litigation deters many immigrant workers from pursuing valid claims. Recognizing this chilling effect and the low probative value of immigration status evidence, courts across the country have entered protective orders keeping immigration status out of litigation.[19] As the Ninth Circuit has recognized:

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[19] *See, e.g., E.E.O.C. v. First Wireless Group, Inc.* (E.D.N.Y. 2004) 225 F.R.D. 404, 406 (holding that the probative value of the information does not outweigh the severe prejudicial effect such information would have on the abilities of immigrant workers to pursue their claims and thus that it would "constitute [an] unacceptable burden on public interest"); *E.E.O.C. v. Bice of Chicago* (N.D.Ill. 2005) 229 F.R.D. 581, 583 (denying discovery as to immigration status "because questions about immigration status are oppressive, they constitute a substantial burden on the parties and on the public interest and they would have a chilling effect on victims of employment discrimination from coming forward to assert discrimination claims"); *Flores v. Amigon dlb/a La Flor Bakery* (E.D.N.Y. 2002) 233 F. Supp.2d 462, 465, fn. 2 (stating that discovery of immigration status would effectively eliminate the Fair Labor Standards Act as a means for protecting undocumented workers from exploitation and retaliation); *Liu v. Donna Karan International, Inc.* (S.D.N.Y. 2002) 207 F. Supp. 2d 191, (denying discovery of immigration status based on risk of intimidation and chilling effect); *Topo v. Dhir* (S.D.N.Y. 2002) 210 F.R.D. 76, 79 (denying discovery of immigration status because of its in terrorem effect even though status could be relevant to a collateral matter on cross examination); *E.E.O.C. v. The Restaurant Co.* (D. Minn. 2006) 448 F. Supp. 2d 1085, 1086-1088 (holding immigration status not relevant where no claim was made for either back pay or front pay and not relevant prior to damages phase of proceeding); *Galaviz- Zamora v. Brady Fanns, Inc.* (W.D. Mich. 2005) 230 F.R.D. 499, 501 (holding that a plaintiff must "articulate specific facts showing 'clearly defined and serious injury' resulting from the discovery sought" in order to obtain a protective order, and finding that possibility of discharge, prosecution, deportation, and withdrawal of claim meets this standard); *Lozano v. City of Hazleton* (M.D. Pa. 2006) 239 F.R.D. 397, 399-400 (determining harm to plaintiffs of disclosure of immigration status outweighs benefit to defendants of that information).

> Even documented workers may be chilled... fear[ing] that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding. Any of these individuals, failing to understand the relationship between their litigation and immigration status, might choose to forego civil rights litigation.

(*Rivera, et al. v. NIBCO, Inc*. (9th Cir. 2004) 364 F.3d 1057, 1065; *see* also *United States v. Brignoni-Ponce* (1975) 422 U.S. 873, 879 (1975) ["The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation."].[20]) In light of these concerns, the *Rivera* court recognized that requiring plaintiffs to answer questions about immigration status "in the discovery process would likely deter them, and future plaintiffs, from bringing meritorious claims." (*Rivera, supra,* 364 F.3d at. p. 1064.) A rule that immigration status is relevant to future medical procedures would result in a far greater chilling effect, since it not only focuses judicial scrutiny on the immigration status of the plaintiff, but it directly conditions the availability of judicial relief upon that status.

The *Hernandez* case provides a stark illustration of this danger, in this quote from the trial judge:

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[20] *See* also *Flores v. Amigon d/b/a La Flor Bakery* (E.D.N.Y. 2002) 233 F. Supp. 2d 462, 465, fn.2 ("If forced to disclose their immigration status, most undocumented aliens would withdraw their claims or refrain from bringing an action such as this in the first instance."); *Sandoval v. Rizzuti Farms, Ltd.* (E.D. Wash. 2009) 2009 WL 2058145, 3 (discovery of immigration status barred "in order to prevent manifest injustice and a chilling of Plaintiffs' private right of action").

> There's a lot of jurors unfortunately, Mr. Henderson [plaintiff s counsel], as you may find out sadly at the end of this trial, [who] feel that anyone that comes into this fine country illegally, even for the motive of working, to come in illegally and then try to take advantage of our system for legal setup for legal residents, that we all pay money to support, pay their salaries, pay the buildings, yada, yada.
>
> It's too bad this poor gentleman hurt his foot, hand, whatever, but he came here to work illegally. So he's running the risk of getting injuries. He's running a risk of getting injured on any job if he is injured and outside the system. Tough. That's your problem.

Hernandez, supra, 109 Cal.App.4th at p. 457.

These comments vividly illustrate the harm that can occur from references to immigration status. Courts need to focus juries on issues of liability and damages and not allow them to be distracted by emotionally charged issues whose remote and speculative probative value is far outweighed by almost certain prejudice. The *Hernandez* court found that the admission of the plaintiff's immigration status, coupled with the trial court's lack of impartiality, was so prejudicial that the trial court should have declared a mistrial. That same remedy should have been given here.

The Washington Supreme Court recently confronted the identical question of whether the admission of a party's undocumented status was inherently prejudicial in *Salas v.Hi-Tech Erectors* (Wash. 2010) 168 Wash. 2d 664. In *Salas*, the Washington Supreme Court reversed a Court of Appeal decision that the admission of the plaintiff's immigration status was not so prejudicial as to overcome the minimal relevance as to the plaintiff's future earnings: "We recognize that immigration is a politically sensitive issue. Issues involving

immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation." (*Id.* at p. 673.) In doing so, the Court followed both its own Court of Appeals' decisions finding that ""[q]uestions regarding a defendant's immigration status are . . . designed to appeal to the trier of fact's passion and prejudice"" and a decision from Wisconsin "that the admission of immigration status has "obvious prejudicial effect."" (*Id.* at p. 672; *Gonzalez v. City of Franklin* (Wis. 1987) 137 Wis.2d 109, 140).

The courts that have recognized the inherently prejudicial effect of telling a jury that a plaintiff is undocumented have simply reflected the reality that a substantial portion of our society views undocumented noncitizens as somehow deserving of less relief. This Court should also recognize the prejudicial effect of the trial court's informing the jury of Mr. Velasquez's status and the sheer futility of attempting to cure this error by an instruction.

CONCLUSION

Every day, immigrant workers perform some of the most dangerous jobs in our country. Every day, many suffer occupational illnesses, injuries, or death on the job. Like all other workers, they are entitled to full compensation. The courts should not permit speculation concerning an injured plaintiff's present or future status, the likelihood of immigration reform in his lifetime, or the remote possibility that he may someday be apprehended and deported. In order to ensure that tortfeasors are deterred and safe workplaces are a reality for all, we urge this

Court to reverse and remand this case for a new trial, with instructions to the trial court that immigration status evidence should not be admitted.

Dated: June 30, 2014

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify that this brief complies with the type-volume limitation of Cal. Rule of Court 8.204(c)(1). This brief is printed in 13-point Times New Roman font, and, exclusive of the portions exempted by Cal. Rule of Court 8.204(c)(3) contains less than 14,000 words.

Dated: June 30, 2014

By /s/ Joshua Stehlik
Joshua Stehlik

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 30, 2014, I electronically filed the foregoing Application and Proposed Brief for *Amicus Curiae* with this Court and served three paper copies via hand delivery to the following address:

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Electronically submitting a Civil brief will satisfy the requirements for service on the Supreme Court under rule 8.212(c)(2).

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